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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KENDRICK DALY, Defendant and Appellant.	B212343 (Los Angeles County Super. Ct. No. BA308453)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bob S. Bowers, Judge. Affirmed.

Alan C. Stern, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster, and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

Kendrick Daly appeals from the judgment entered upon his convictions by jury of attempted murder (Pen. Code, §§ 664, 187, count 2),[1] three counts of assault with a firearm (§ 245, subd. (a)(2), counts 3, 7 & 8), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1), count 5) and mayhem (§ 203, count 6).[2] The jury found to be true as to count 2 the firearm allegations within the meaning of section 12022.53, subdivisions (b), (c) and (d), as to counts 3, 7 and 8 the firearm allegation within the meaning of section 12022.5, subdivision (a), and as to counts 5, 6, and 8 the great bodily injury allegation within the meaning of section 12022.7, subdivision (c). The trial court sentenced appellant to state prison for an aggregate term of 14 years eight months plus 25 years to life. Appellant contends that there is insufficient evidence to support his conviction of assault with a firearm as alleged in count 3.

We affirm.

FACTUAL BACKGROUND[3]

In 1999, Frank Moguel (Frank) and his sister came to California from Belize to live with their aunt, Shroleen Slusher (Slusher), and her husband, appellant. In 2001, Frank's father, Frank Sanchez (Frank Sr.), mother, brother, Michael Moguel (Michael), and five other siblings, joined them and lived with appellant for eight to 12 months.

Frank Sr., and his family eventually moved from appellant's residence to August Street. Afterwards, appellant and Slusher moved nearby. Sometime after the families had their own residences, a disagreement occurred between them. As a result, Frank and Michael claimed to have had no communications with appellant for a year or two.

Appellant made unrequited overtures to renew contact with Frank and Michael. On August 28, 2006, he came to their apartment with gifts for the family. He left at the

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 The jury acquitted appellant of attempted murder in count 1, and the trial court granted appellant's motion to dismiss a second degree robbery charge in count 4.

3 Because the issue on appeal is unrelated to appellant's convictions in counts 5 and 6 relating to appellant's beating of an elderly man, we omit the facts relating to those charges.

same time as Frank and Michael were leaving, and asked them to "hang" with him. Instead, they went to a friend's house. They observed a gun in appellant's waistband.

Later that day, appellant returned to Frank and Michael's apartment and had words with Frank Sr. because appellant entered the apartment without knocking. When appellant left, Frank and Michael were returning home. Appellant looked upset and said that Frank Sr. was "tripping'" because he did not want appellant in the house. Appellant told Frank that he had a hand-held video game and charger for Frank's younger brother, and he would call Frank to pick it up.

On the morning of August 29, 2006, appellant telephoned Frank and told him that the video game was ready to be picked up. Frank, Michael and a friend, Jason Mahi (Jason), walked to appellant's apartment. When they got there, appellant was busy outside. Ten or 12 minutes later, when he was finished, they went up to his apartment. Appellant had a gun in his waistband. Frank and Michael did not have any guns.

In the apartment, appellant, Frank and Michael smoked marijuana; Jason did not. Appellant also inhaled and licked a wet cigarette without lighting it, leading Frank to believe that appellant ingested and was under the influence of PCP. Appellant began referring to himself as God and the devil. At one point, he said he did not want Jason in his apartment because Jason was a "dirty African," referring to the fact that Jason was born in the Ivory Coast. After approximately 30 minutes, Frank told appellant they were leaving. Appellant did not want them to go. When Frank insisted, appellant's demeanor changed, as he looked at them "with a face." He said he would walk with them halfway.

Appellant walked between Frank and Michael, put his arms around their necks, squeezed them tightly and pulled their heads towards his. He told them they were family and must stick together. He also said, "Y'all disrespected me," and asked them to stop. Jason, who initially walked in front of them, had slowed down so they could pass him and was then walking in the street, approximately 15 feet behind them.

Frank removed appellant's hand from his neck and walked into the street. Appellant maintained a hold on Michael and put his left hand on Michael's chest, observed that it was beating fast, and stated, "I am the devil, I am God." "You want me

to stop it? I'm the devil. You want me to stop it." Michael moved appellant's arm away, walked off of the sidewalk onto the street, and then back onto the sidewalk, where Jason stood behind him.

Appellant pulled out the gun, held it in both hands, and put it up to Michael's face, from two to four feet away. Jason was one step behind Michael, and Frank was still in the street. Michael put his hands by his head, palms forward. He was then shot in the left forearm. With his right hand, Michael grabbed appellant's hand holding the gun, placing his hand over the muzzle. He was then shot in the right hand. Michael fell to the ground in front of appellant, with appellant still pointing the gun at him. Jason remained behind Michael in the street, in the same direction as appellant was pointing the gun. If appellant had raised his hands parallel to the ground, the gun would have been pointed directly at Jason, though Jason never saw appellant do that. When Michael turned around to run, Jason was "right around [him]," just one step behind. Michael was shot in the back.

Michael ran away and looked back and saw Frank and appellant fighting. Without looking back, Jason heard additional shots as he was running. Michael kept running with Jason until a woman offered to help him until paramedics arrived. Jason left when paramedics arrived.

According to Frank, he initially heard three gunshots and saw appellant point the gun directly at Michael's face. They were four feet apart. He rushed appellant, grabbing the gun so appellant would not shoot Michael. They struggled for the gun, and a shot went off and hit Michael in the back. Appellant pointed the gun at Frank's face, so Frank slammed appellant against a parked car and ran north. As he was running, Frank heard three additional gunshots and appellant yell, "Don't run you, I will kill you." When Frank looked back, appellant had the gun pointed at him. Frank ran home, where he first realized he had been shot in the arm, and then returned to where Michael was located.

Appellant's version of events differed dramatically. He denied that there were problems between him and Frank and Michael and that there was a lengthy period without communication between them. He claimed that on August 29, 2006, at approximately 7:00 a.m., Frank called him to arrange to pick up the video game and

charger. Appellant denied using PCP before or after Frank, Michael and Jason came to his apartment, though he had used PCP in the past. Appellant was perturbed, though not angry, that Frank and Michael did not tell him they were bringing Jason, who appellant had never met. Appellant, Frank and Michael and perhaps Jason smoked a lot of marijuana.

When they left appellant's apartment, Michael was walking on his right, Frank on his left and Jason in front. Appellant had his arms around their shoulders as he was telling them that as family they had to stick together. After several more steps, Frank and appellant got into a dispute over what had happened between appellant and Frank Sr. when appellant visited his home the day before. Frank removed appellant's hand from his neck and shoved him. Michael shoved him from the other side. Appellant then grabbed and pushed Frank in his face with his left hand. When he turned to push Michael, they all began to wrestle. Jason then ran away. A gun, which appellant did not know Frank had, fell from Frank's waist. Appellant and Frank struggled for the gun, which Frank reached first. Michael was also struggling with them. Shots went off and Michael was right in front of the gun. Frank slammed appellant against a car. The gun was pointed upward and went off a couple of times as Frank pulled the trigger. Frank tried to point the gun at appellant, but appellant was not shot.

Appellant denied owning a gun, having a gun in his possession at the time of the shooting and shooting his nephews.

DISCUSSION

Appellant's sole contention on appeal is that there is insufficient evidence to support his conviction of assault with a firearm on Jason (count 3). He argues that the evidence fails to establish that he performed an act with the firearm that by its nature would directly and probably result in application of force to Jason and that there was therefore no willful act or facts that would have led a reasonable person to realize that such an act by its nature would directly and probably result in application of force to Jason. This contention is meritless.

"When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination . . . ." (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874.) "[W]e review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.)

To establish an assault, the prosecutor must prove the defendant willfully committed "an act that by its nature will probably and directly result in injury to another (i.e., a battery), and with knowledge of the facts sufficient to establish that the act by its nature will probably and directly result in such injury." (*People v. Miceli* (2002) 104 Cal.App.4th 256, 269; *People v. Williams* (2001) 26 Cal.4th 779, 782 (*Williams*); see also *People v. Rocha* (1971) 3 Cal.3d 893, 899; *People v. Colantuono* (1994) 7 Cal.4th 206, 214.) Unlike in other jurisdictions, in California, an assault requires no subjective specific intent to injure or even batter another person. (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1628.)

"[T]he question of intent for assault is determined by the character of the defendant's willful conduct considered in conjunction with its direct and probable consequences. If one commits an act that by its nature will likely result in physical force on another, the particular intention of committing a battery is thereby subsumed. Since the law seeks to prevent such harm irrespective of any actual purpose to cause it, a

general criminal intent or willingness to commit the act satisfies the mens rea requirement for assault." (*People v. Colantuono*, *supra*, 7 Cal.4th at p. 217.) "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur." (*Williams*, *supra*, 26 Cal.4th at pp. 787-788, fn. omitted.)

This objective standard leads inexorably to the conclusion that, "[A]n intent to do an act which will injure any reasonably foreseeable person is a sufficient intent for an assault charge." (*People v. Tran* (1996) 47 Cal.App.4th 253, 262.) For example, in *People v. Tran, supra,* 47 Cal.App.4th 253, the Court of Appeal concluded that chasing a man while brandishing an 18-inch knife constituted an assault on both the intended victim and a sleeping baby being carried by the victim, even though there was no intent to harm the child. Similarly, in *People v. Lee* (1994) 28 Cal.App.4th 1724, 1734, a jury finding that three shots at an intended victim constituted both attempted murder of that victim and assault on a nearby companion of that victim was upheld by the appellate court.

Here, there was sufficient evidence that appellant committed a willful act. Michael testified that appellant pulled out a gun, held it in both hands, and put it up to Michael's face. Michael moved his hands up to protect his face and was shot in the left forearm. When he grabbed the gun to try to prevent further injury, he was shot again in the hand. He turned to run and was shot in the back.

Appellant contends, however, that the evidence fails to establish that he did an act with the firearm that by its nature would directly and probably result in application of force to Jason and that there were no facts that would have led a reasonable person to realize that such an act would probably and directly result in application of force to Jason. The evidence belies this argument.

Frank, Michael and Jason were in appellant's apartment before the shooting. There, appellant registered his displeasure that Frank and Michael brought Jason with

them without telling him. He also told Frank that he did not want Jason in his apartment because Jason was a "dirty African."

When they left the house, appellant and his three visitors all walked together. Appellant testified that Jason walked in front of the others, establishing that he was keenly aware of Jason's presence. When Jason heard appellant and his nephews talking loudly, he slowed down to let them pass and walked behind them. Immediately before the shooting, Michael walked onto the sidewalk, Jason behind him. Michael testified that when appellant pointed the gun at Michael's face, Jason was only one step behind Michael. When Michael turned around to run, he testified that Jason was "right around [him]." Jason testified that at the time the first shots rang out, he was 12 feet away from Michael. Any apparent uncertainty or discrepancy between Jason's and Michael's testimony simply presents evidentiary issues for the trier of fact to resolve. (See *People v. Watts* (1999) 76 Cal.App.4th 1250, 1259 ["uncertainties or discrepancies in witnesses' testimony raise only evidentiary issues that are for the jury to resolve"].) But Jason testified that when appellant pointed the gun at Michael, when Michael was on the ground after having been shot twice, the gun was pointed in Jason's direction. In fact, he testified that if appellant had raised his hand holding the gun to a level position, the gun would have been pointed directly at Jason. Thus, appellant shot in Jason's direction, knowing he was there, or at the very least with conscious disregard for Jason's life.

The fact that appellant may not have intended to shoot Jason does not preclude his conviction of assault with a deadly weapon, as that offense does not require a specific intent to injure the victim. (*Williams, supra*, 26 Cal.4th at p. 788.) When an act inherently dangerous to others is committed with a conscious disregard of human life and safety, the intent to commit a battery is presumed. (*People v. Griggs* (1989) 216 Cal.App.3d 734, 740.) Further, the fact that Jason was not battered or wounded does not prevent us from sustaining the conviction. (*People v. Lee*, *supra*, 28 Cal.App.4th at p. 1734.)

Here, the jury could reasonably have concluded that appellant was aware of sufficient facts that would lead a reasonable person to realize that a battery on Jason

would "directly, naturally and probably result" (*Williams, supra*, 26 Cal.4th at pp. 787-788) from his conduct. He knew that he was with three other people, including Jason, in close proximity. He knew the inherent danger involved in shooting a firearm when people are around. Not only did he shoot the firearm once, he fired it six times.

DISPOSITION

The judgment is affirmed.

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_____, P. J.
BOREN

We concur:

_____, J.
ASHMANN-GERST

_____, J.
CHAVEZ